

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL JOHN RUSSELL,

Defendant and Appellant.

D052351

(Super. Ct. No. SCD205199)

APPEAL from a judgment of the Superior Court of San Diego County, David J. Daniels, Judge. Affirmed.

Michael John Russell entered a negotiated guilty plea to assault with a semiautomatic firearm (Pen. Code, § 245,<sup>1</sup> subd. (b)) and corporal injury to a cohabitant (§ 273.5, subd. (a)). Russell also admitted he personally used a firearm in the commission of the assault count. (§ 12022.5, subd. (a).) The plea bargain called for

---

<sup>1</sup> Statutory references are to the Penal Code.

dismissal of the remaining 10 counts, including eight felonies, and a sentencing bid of 11 years.

After denying probation, the trial court sentenced Russell to a 10-year prison term.

The trial court denied Russell's request for a certificate of probable cause.

## FACTS

Russell and Sara Diot dated for one and one-half years and lived together for part of that time. Diot characterized the relationship as mentally and physically abusive.

For example, on February 23, 2006, after Diot asked Russell to lower the volume on the television, he attacked her. He grabbed her arms and slammed one of them against the oven. When she retreated to the living room, Russell pursued her and grabbed her by the throat before slamming her to the floor. Subsequently, Russell jumped on top of Diot, pinned her arms down and started to verbally abuse her. Russell then grabbed her throat and started choking Diot. When Diot tried to extricate herself by digging her fingernails into Russell's hands, he started to bang her hand on the floor.<sup>2</sup>

On August 18, 2006, Diot ended the relationship after an incident in which she fell out of a moving truck driven by Russell. Diot had been feeling nauseous and asked Russell to pull over, but he refused. Diot opened the door to vomit and Russell made a quick turn, which caused her to fall on the pavement. Diot suffered a skull fracture and brain damage, which resulted in the loss of her sense of smell and taste.

---

<sup>2</sup> This incident is the basis for the domestic abuse count.

During the six months after the breakup, Russell continually called Diot and asked her to take him back. Sometimes, Russell threatened Diot during these calls.

In mid-February 2007, Diot filed a police report after Russell called her numerous times one day and threatened her during some of the calls. Diot believed the threats were credible and she was afraid.

On the night of March 6, 2007, codefendant Sara Workman, who was Russell's girlfriend at the time, telephoned Diot and they arranged a meeting at a local Rite Aid store parking lot. Diot initially refused, but then agreed to meet Workman. Diot asked her sister Lindsey and Lindsey's boyfriend, Jeremy Summers, to accompany her.

In the parking lot, Workman started to verbally abuse Diot and then shoved her to the ground. While Workman was punching Diot, Russell repeatedly told her to hit Diot in the left rear part of her head, where Diot had suffered the skull fracture. Workman continued to punch Diot in the back of the head until Diot was unconscious.

During Workman's assault on Diot, Lindsey Diot tried to intervene, but Russell said: "Let them be alone[.] That's their fight to fight." When Russell tried to grab Lindsey Diot's arm, Summers stopped him. Summers then grabbed Russell around the neck and they fell to the ground. Russell went to his car and came back with a black handgun, which he waved and then pointed at Summers and the Diot sisters before leaving the scene.

## DISCUSSION

Appointed appellate counsel has filed a brief setting forth evidence in the superior court. Counsel presents no argument for reversal, but asks this court to review the record

for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel refers to as possible, but not arguable, issues: (1) whether the trial court abused its discretion in deciding this was not an unusual case that merited probation; and (2) whether the court erred by imposing the midterm on the assault with a semiautomatic firearm count rather than the low term.

We granted Russell permission to file a brief on his own behalf. He has responded.

Russell contends his trial counsel provided ineffective assistance of counsel for not filing a motion to suppress evidence and statements, and not raising various mental issues on his behalf, including Russell's competency to stand trial, a temporary insanity defense, and a not guilty by reason of insanity plea. Russell also claims he was not competent to plead guilty because he was on psychotropic medication at the time of the plea, as well as at the time of the instant offenses. Additionally, Russell faults trial counsel for telling him he would receive a six-year sentence under the plea bargain and for not obtaining a certificate of probable cause. Russell asks this court to issue him a certificate of probable cause. He contends his guilty plea (1) was induced by the false promise of a six-year sentence and (2) was not made knowingly, intelligently or voluntarily.

Russell also contends he received ineffective assistance by his appellate counsel for filing a *Wende* brief.

Further, Russell contends his three-year enhancement under section 12022.5, subdivision (a) for personal use of a firearm was illegal because firearm use is an element

of the underlying assault offense. Russell asserts the trial court abused its discretion by considering his juvenile record as an aggravating circumstance in its sentence determination.

To establish ineffective assistance of counsel, Russell must show (1) counsel failed to act in a manner to be expected of a reasonably competent attorney, and (2) counsel's acts or omissions prejudiced him. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692.)

The prosecution's case against Russell was based on victim and eyewitness statements—not on inculpatory statements by Russell during police interviews or inculpatory evidence seized by police in a manner to implicate the Fourth Amendment.<sup>3</sup> Trial counsel did not provide ineffective assistance by failing to file a motion to suppress evidence and/or a motion seek to exclude statements Russell made during custodial interrogation in violation of *Miranda v. Arizona* (1966) 384 U.S. 436. Counsel does not render ineffective assistance by failing to make motions that would be futile. (*People v. Price* (1991) 1 Cal.4th 324, 387.)

Similarly, trial counsel was not ineffective with respect to the various mental issues raised by Russell in his supplemental brief. A defendant is mentally incompetent if, as a result of a mental disorder or developmental disability, he is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a

---

<sup>3</sup> The pictures offered by the prosecution at the sentencing hearing were taken from Russell's Web site.

rational manner. (*People v. Pennington* (1967) 66 Cal.2d 508, 515-516.) There is no showing in this record that Russell was not competent to stand trial. Trial counsel thoroughly cross-examined the prosecution witnesses at the preliminary hearing using information supplied by Russell. Likewise, at the sentencing hearing, counsel's arguments in favor of probation and a mitigated sentence were based, in large part, on input by Russell. Russell was able to—and did—understand the nature of the proceedings against him and assisted counsel in conducting the defense in a rational manner. There was no basis for trial counsel to file a motion under section 1368 to have Russell declared mentally incompetent, and therefore counsel should not be faulted for failing to file such a motion. (*People v. Price, supra*, 1 Cal.4th at p. 387.)

In order to prevail on a defense of insanity the defendant must show, by a preponderance of the evidence, that, at the time the offense was committed, the defendant was incapable of knowing or understanding the nature of his or her act or of distinguishing right from wrong. (*People v. Lawley* (2002) 27 Cal.4th 102, 169-170.) On this record, there is no showing that Russell was unaware of the wrongfulness of his conduct at the time of the assault and the domestic violence. (See Russell's statement at the sentencing hearing.) Given the lack of evidence to support a temporary insanity defense or a plea of not guilty by reason of sanity, it follows that defense counsel did not render ineffective assistance by failing to present such a defense or in pursuing such a plea.

Also, we note that at the beginning of this case, counsel had Russell's mental status professionally evaluated. Counsel may have decided that a mental defense would not

have been successful in light of that evaluation and/or in light of the evidence in this case. (See *People v. Hayes* (1990) 52 Cal.3d 577, 624.) Because counsel could have had legitimate reasons for not offering a mental defense, Russell has failed to demonstrate that counsel's performance was inadequate.

Russell's attacks on his guilty pleas are not cognizable on appeal because he did not obtain a certificate of probable cause. (§ 1237.5; *People v. Panizzon* (1996) 13 Cal.4th 68, 84.) Russell's challenges to the pleas also lack substantive merit. There is no indication in this record that (1) defense counsel promised Russell that if he accepted the plea bargain, he would receive a six-year sentence, or (2) that Russell would have rejected the plea bargain if such a representation had not been made. The face of the plea bargain shows an 11-year sentencing lid. Before taking Russell's pleas, the trial court told him that it would not impose a sentence greater than 11 years and the following colloquy took place.

"[THE COURT]: I trust that no one has promised you anything other than what I have just said?

"[RUSSELL]: Yes, Your Honor.

"[THE COURT]: True?

"[RUSSELL]: That is true."

In evaluating counsel's performance, we observe counsel negotiated a plea bargain that was advantageous for Russell, who faced 10 other counts, including eight felonies. The sentencing lid of 11 years also was advantageous to Russell since he faced a potential

maximum sentence of 20 years on the two counts to which he pleaded guilty and his admission on the firearm enhancement.

Russell's claim that he was not competent to plead guilty because he was on psychotropic medication at the time of the plea is belied by the record. On the change of plea form, Russell initialed the box next to the following statement: "I am sober and my judgment is not impaired. I have not consumed any drug, alcohol or narcotic within the past 24 hours." The court found that Russell (1) made a knowing, voluntary and intelligent waiver of his constitutional rights and (2) understood the nature of the charges and the possible consequences of the plea. Substantial evidence supported these findings.

Russell's attempt to label trial counsel ineffective for not obtaining a certificate of probable cause cannot succeed. Although counsel did not seek a certificate of probable cause, Russell independently requested one. The court denied Russell's request. Thus, Russell has not established the second prong of ineffective representation, namely prejudice. We also observe it is not within the purview of an appellate court to issue a certificate of probable cause; hence, we decline Russell's request to issue one. (See § 1237.5)

Russell's complaint about imposing a three-year enhancement under section 12022.5 when firearm use is an element of the underlying crime does not take into account subdivision (d) of the statute. Section 12022.5, subdivision (a) bars imposing the enhancement if a firearm is an element of the underlying offense. However, section 12022.5, subdivision (d) carves out an exception for the bar: "[T]he additional term



provided by this section shall be imposed for any violation of Section 245 if a firearm is used." (§ 12022.5, subd. (d); see *People v. Kramer* (2002) 29 Cal.4th 720, 723, fn. 2.)

Finally, Russell has misread the transcript of his sentencing hearing in arguing the trial court abused its discretion by considering his juvenile record as a factor in aggravation. The transcript shows the court gave little weight to Russell's juvenile record. In deciding to impose the middle term on the assault with a firearm count, the court treated Russell's "relatively insignificant criminal record" as a factor in mitigation to balance factors in aggravation, such as the "high degree of callousness" of the crime, the recruitment of Workman to participate in the crime, and Russell's loading the gun after realizing it was unloaded.

A review of the record pursuant to *People v. Wende*, *supra*, 25 Cal.3d 436 and *Anders v. California*, *supra*, 386 U.S. 738, including the possible issues referred to by appellant counsel, has disclosed no reasonably arguable appellate issues. Competent counsel has represented Russell on this appeal.

DISPOSITION

The judgment is affirmed.

---

McCONNELL, P. J.

WE CONCUR:

---

HALLER, J.

---

AARON, J.